15-415

No. _____

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
213-330-4450

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

(Additional Counsel Listed on Inside Cover)

September 30, 2015

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
925-297-6415

Counsel for Petitioner

QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims, concluding that a service advisor is a "salesman ... engaged in ... servicing automobiles" and is thus exempt from the FLSA's overtime requirements. The Ninth Circuit reversed, deferring to a Department of Labor interpretive regulation stating that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service automobiles. The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which hold that service advisors are exempt employees. Pet.App.11.

The question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. They are an integral part of the servicing process and are the salesmen dedicated to the servicing business at their dealership. And, like countless other salesmen, Respondents are paid by commissions on their sales rather than on an hourly basis.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). For more than 40 years, federal and state courts across the country have uniformly held that service advisors such as Respondents are covered by the exemption because they are "salesm[e]n ... engaged in ... servicing automobiles." *See, e.g., Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). Those courts have also uniformly refused to defer to a Department of Labor (DOL) interpretive regulation that adopts a narrow and counter-textual interpretation of the exemption under which service advisors are not exempt because they do not *personally* service vehicles.

Respondents brought suit against their employer under the FLSA, alleging that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours. Relying on an unbroken line of precedent holding that service advisors were

exempt under §213(b)(10)(A), the district court dismissed the complaint. Pet.App.25-29. But the Ninth Circuit reversed, holding that service advisors were not exempt. Unlike every other court to consider the issue, the Ninth Circuit held that DOL's narrow interpretation of §213(b)(10)(A) was entitled to deference. Pet.App.11-19. The court also relied heavily on a purported canon of construction under which exemptions to the FLSA must be interpreted "narrowly" rather than being interpreted in accordance with their plain text. Pet.App.6. The Ninth Circuit expressly acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11.

Certiorari is plainly warranted to resolve this acknowledged split of authority over the meaning of a federal statute. Indeed, the Ninth Circuit's decision not only opens up an explicit circuit split, but its interpretation badly misconstrues the text of §213(b)(10)(A). Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. Yet the Ninth Circuit divided a dealership's salesforce in half, treating only those selling automobiles, and not those selling services, as exempt. The court also ignored the fact that service advisors are an integral part of the servicing process because they are the salesforce that identifies the service needs of, and sells services to, the dealership's customers.

The Ninth Circuit's insistence that an employee must be personally involved in servicing automobiles

not only adds a word to the statute, but also injects a glaring textual anomaly over the status of "partsmen," who the statute treats as exempt even though they are not personally involved in either selling or servicing automobiles. Every other court to consider this issue has correctly recognized that the phrase "primarily engaged in ... servicing automobiles" encompasses service advisors and partsmen who are engaged in the servicing *process* even though they do not personally service vehicles.

The Ninth Circuit's decision injects uncertainty into what had been a settled area of the law, and will have serious consequences for the nation's 18,000 car dealerships, which currently employ more than 45,000 service advisors. Those dealerships and their service advisors have negotiated mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt from the FLSA's overtime requirements. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of the way in which those employees are compensated, and would force dealerships to divide their salesforces into exempt and non-exempt categories in ways that are both divisive and contrary to Congress' plain intent.

This Court has repeatedly rejected plaintiffs' attempts to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g., Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014) (rejecting novel FLSA claims for time spent in security screenings); *Christopher v.*

SmithKline Beecham, 132 S. Ct. 2156 (2012) (rejecting FLSA claims by pharmaceutical sales representatives, who had long been treated as exempt); *see also Yi v. Sterling Collision Centers*, 480 F.3d 505, 510 (7th Cir. 2007) (rejecting novel FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing"). The decision below should fare no better. This Court should grant certiorari to correct the Ninth Circuit's deeply flawed interpretation of §213(b)(10)(A) and restore uniformity to this important area of the law.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 780 F.3d 1267 and reproduced at Pet.App.1-19. The district court's opinion is unpublished and is reproduced at Pet.App.22-32.

JURISDICTION

The Ninth Circuit issued its opinion on March 24, 2015, and denied a timely petition for rehearing on June 1, 2015. On August 20, 2015, Justice Kennedy extended the time for filing this petition to September 30, 2015. *See* No. 15A210. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, and DOL's regulations, 29 C.F.R. §779.372, are reproduced at Pet.App.33-61.

STATEMENT OF THE CASE

A. The "Salesman, Partsman, or Mechanic" Exemption and DOL's Shifting Interpretations

1. The FLSA generally requires employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of forty in a week. 29 U.S.C. §207(a)(1). Accompanying these overtime-pay requirements are numerous exemptions for certain types of employees. *See id.* §213(a), (b). The exemptions range from very broad (all employees of certain rail carriers and air carriers, *id.* §213(b)(2), (3)) to very narrow (employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15)).

As relevant here, the FLSA provides that the overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A); *see* Pub. L. No. 89-601, 80 Stat. 830 (1966). In other words, an employee of a car dealership is exempt from the overtime rules if he: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

2. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971); 35 Fed. Reg. 5856, 5895-96 (1970). Those regulations defined "salesman" as "an employee who

is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]." 29 C.F.R. §779.372(c)(1) (1971).[1] DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt under [§213(b)(10)]." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." *Id.*

In the years after DOL promulgated this interpretive regulation, several courts rejected the agency's narrow interpretation of the exemption. Most significantly. the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt. *See Deel Motors*, 475 F.2d at 1097-98. In *Deel Motors*, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not *personally* service vehicles. But the Fifth Circuit rejected that view based on both the text and

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[1] The regulation defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2) (1971). It also defined a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such." *Id.* §779.372(c)(3).

purpose of the exemption. As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And, turning to the purpose of the exemption, the Fifth Circuit noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097 All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus concluded that service advisors were exempt under §213(b)(10)(A).

3. Within a few years of the Fifth Circuit's decision in ***Deel Motors***, DOL backtracked from the position advanced in its interpretive regulations. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be treated as exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403 (July 28, 1978) ("DOL 1978 Opinion Letter") (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

Similarly, DOL's 1987 Field Operations Handbook instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." Dep't of Labor, Wage & Hour Div., Field Operations

Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover service advisors. *Id.*[2] The Handbook acknowledged that "this policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

Despite these clear (and clearly correct) changes in DOL's enforcement policy, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained in the Code of Federal Regulations. In 2008, DOL initiated a formal rulemaking process to update the text of the regulations to confirm that service advisors were exempt from the overtime-pay requirements. *See Updating Regulations Issued Under the FLSA*, 73 Fed. Reg. 43,654 (2008). As DOL explained, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *Brennan*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a

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[2] In addition to the Fifth Circuit's decision in *Deel Motors*, the Sixth Circuit had summarily affirmed a district court decision finding service advisors to be exempt under §213(b)(10)(A). *See Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table).

modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation in line with the governing case law. *See Updating Regulations Issued Under the FLSA*, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but also eliminated from its regulations any explicit discussion of whether service advisors were covered under the §213(b)(10)(A) exemption, *see* 76 Fed. Reg. at 18,859. In its explanation accompanying the final rule, DOL stated that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838. That remains DOL's position today: DOL believes that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service vehicles.

B. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Respondents are current and former employees of Petitioner who worked at the dealership as "service advisors." On September 18, 2012, Respondents filed a complaint alleging several violations of the FLSA and California Labor Code.

The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate customers' service

and repair needs; suggest services to be performed on the vehicle to address the customers' complaints; solicit supplemental services to be performed (such as preventive maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. *See* Complaint ¶16 (DN 2). In short, Respondents' sales activities were integral to the process of servicing vehicles at the dealership. And, like countless other salesmen in both car dealerships and other industries, Respondents were paid by commission. *Id.* ¶¶18-19.[3] The more services an advisor sold, the higher his or her commission would be. *Id.*

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them time-and-a-half overtime compensation for that excess time. *Id.* ¶¶24-31. Petitioner moved to dismiss the FLSA claims on the ground that Respondents were exempt employees under 29 U.S.C. §213(b)(10)(A).

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the overtime-pay exemption in §213(b)(10)(A). *See* Pet.App.25-29. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.26 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

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[3] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships (like Petitioner) pay service advisors solely by commission.

The district court acknowledged that DOL had stated in 1970 and apparently again in 2011 that §213(b)(10)(A) did not apply to service advisors. Pet.App.27 The court nonetheless refused to defer to those interpretations under the *Chevron* framework because they were unreasonable. Pet.App.28-29. The court agreed with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.29 (quoting *Walton*, 370 F.3d at 452). Because "Service Advisors ... are *functionally equivalent* to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded that it would be "unreasonable" to carve those employees out of the exemption. *Id.* (emphasis added). The court did not believe that "Congress intended to treat employees with functionally similar positions differently." *Id.* (quoting *Deel Motors*, 475 F.2d at 1097-98). The district court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[4]

C. The Ninth Circuit's Decision

On appeal, the Ninth Circuit reversed in relevant part. In an opinion by Judge Graber issued on March 24, 2015, the court held that service advisors who work at a car dealership are not exempt under §213(b)(10)(A) from the FLSA's overtime-pay requirements. Pet.App.19.

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[4] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.31.

The panel relied heavily on the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees," and "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). Because the statute does not define "salesman, partsman, or mechanic," and does not explicitly mention "service advisors," the Ninth Circuit could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.7 (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's application of *Chevron*, concluding that DOL had reasonably interpreted an ambiguous FLSA exemption. The court believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pet.App.7. Under the first interpretation, a service advisor is a "salesman ... primarily engaged in ... servicing automobiles" and is thus exempt. *Id.* Under the second interpretation, which the Ninth Circuit characterized as "at least as plausible," the nouns in the statute would be interpreted in a "more cabined" way: "a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars." *Id.* Under that narrower interpretation, "[s]ervice advisors do none of those things; they sell services for cars." *Id.* The Ninth Circuit thus concluded that the exemption is ambiguous about whether it extends to service advisors. Pet.App.8.

Turning to *Chevron*'s second step, the Ninth Circuit upheld DOL's current interpretation of the exemption as reasonable. Pet.App.11-19. The court's reasoning rested primarily on the same ambiguity that it had identified earlier. In particular, the Ninth Circuit concluded that it was reasonable for DOL to read the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing automobiles." Pet.App.13-15.

The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11 (citing *Walton*, 370 F.3d 446; *Deel Motors*, 475 F.2d 1095; *Thompson*, 294 P.3d 397). But the court "respectfully disagree[d] with those decisions." *Id.*

The panel rejected the other courts' conclusion that DOL's 1970 interpretation of §213(b)(10)(A) was "unduly restrictive." Pet.App.12-13. Those courts had held that DOL's interpretation was unreasonable because it unjustifiably restricted the scope of the statutory text. In particular, DOL's interpretation disregarded the fact that a service advisor could be a "salesman ... primarily engaged in ... servicing automobiles." *See Walton*, 370 F.3d at 452; *Thompson*, 294 P.3d at 402.

The Ninth Circuit, however, concluded that DOL's regulation honored the disjunctive nature of the phrase "salesman ... primarily engaged in selling or servicing automobiles." First, the court concluded that there was ambiguity as to whether the phrase "primarily engaged in selling or servicing" refers to the

act of *personally* selling or servicing automobiles or instead to "the general business" of selling or servicing automobiles. Pet.App.12-14. Second, the court identified as a potential ambiguity whether the word "salesman" was modified only by the gerund "selling" or was instead modified disjunctively by either gerund, "selling" and "servicing." Pet.App.13-15. The court further noted that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive." Pet.App.15.

The Ninth Circuit ultimately concluded that "there are good arguments supporting both interpretations of the exemption," but that "where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice." Pet.App.19. The court thus held that Respondents were not exempt under 29 U.S.C. §213(b)(10)(A) and reversed the district court's dismissal of Respondents' claims.[5] The Ninth Circuit denied a timely petition for rehearing on June 1, 2015.

REASONS FOR GRANTING THE PETITION

This case presents an excellent vehicle for this Court to resolve an acknowledged split of authority over whether tens of thousands of "service advisors" who work at car and truck dealerships are exempt from the FLSA's overtime-pay requirements.

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[5] The Ninth Circuit affirmed the district court's dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. *See* Pet.App.3-4 n.2. And because it reinstated Respondents' federal overtime-pay claim, the Ninth Circuit vacated the district court's dismissal of Respondents' state-law claims for lack of jurisdiction. *See id.*

I.A. In a clear departure from a previously unbroken line of authority. the Ninth Circuit held that service advisors are not exempt from the FLSA's overtime-pay requirements. The court readily acknowledged that its decision "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. Certiorari is warranted because the decision below is plainly in conflict with both "the decision of another United States court of appeals on the same important matter" and "a decision by a state court of last resort." S. Ct. R. 10(a).

I.B. It is unsurprising that the Ninth Circuit's decision is an outlier, as that court badly misconstrued the §213(b)(10)(A) exemption. That exemption unambiguously extends to "any salesman ... primarily engaged in ... servicing automobiles. 29 U.S.C. §213(b)(10)(A). The plain text of this exemption applies to service advisors, who are integral to the process of servicing vehicles at the dealership and are clearly "salesm[e]n ... primarily engaged in ... servicing automobiles." Yet the Ninth Circuit gave dispositive weight to DOL's narrow and counter-textual interpretation of the exemption, which reads out of the statute the phrase "any salesman ... primarily engaged in ... *servicing automobiles*" and reads into the statute a restrictive modifier demanding that an exempt employee be *personally* involved in servicing.

DOL's interpretation flies in the face of the most basic rules of statutory construction and grammar. As to statutory construction, there is no cause for reading into the statute a word that Congress did not include,

especially when doing so creates interpretive problems for other statutory terms (*e.g.*, partsmen are plainly exempt even though they do not personally sell or service automobiles) and practical problems for employers (*e.g.*, dealerships must divide their salesforces between exempt and non-exempt employees in ways Congress did not intend). As for grammar, the term "or" in the phrase "salesman ... primarily engaged in ... selling or servicing" is disjunctive, and either gerund—"selling" or "servicing"—can sensibly be applied to the noun "salesman." Because a service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles," that should be the end of the inquiry under *Chevron*. A service advisor is clearly covered by the plain language of the exemption, as every court to consider this issue (other than the Ninth Circuit) has correctly recognized.

Moreover, treating service advisors as non-exempt makes little sense in the context of the broader FLSA scheme. The FLSA contains many provisions that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid by commission. *See, e.g.*, 29 U.S.C. §§207(*i*), 213(a)(1). Such exemptions reflect the basic reality that salesmen, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. Forcing car dealerships to pay overtime to service advisors is little more than an attempt to fit a square peg (salesmen) into a round hole (FLSA-mandated hourly compensation). *See Christopher*, 132 S. Ct. at 2173 (rejecting FLSA claim by sales representatives who were "hardly the kind of employees that the FLSA

was intended to protect"). Worse still, retroactively treating service advisors as non-exempt under §213(b)(10)(A) would result in perverse and disruptive outcomes for both dealerships and service advisors alike, as it would force them into pay plans very different from the plans they had voluntarily negotiated.

Finally, the Ninth Circuit's heavy reliance on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees" and that "exemptions are narrowly construed against employers," Pet.App.6, is profoundly misplaced. This "anti-employer" canon—which is just an FLSA-specific version of the broad-construction-of-remedial-statutes canon that this Court has characterized as "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—is a recipe for extravagant interpretations of the FLSA. In addition to resolving the circuit split over the proper interpretation of §213(b)(10)(A), this Court could usefully instruct lower courts that the FLSA and its exemptions are to be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's erroneous interpretation of §213(b)(10)(A) will have far-reaching implications for the nation's 18,000 franchised car dealerships, which employ an estimated 45,000 service advisors. Dealerships and service advisors voluntarily negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority finding such employees to be exempt. Yet the Ninth Circuit's decision would require a wholesale reworking of that position, to the detriment of dealerships and

service advisors alike. This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices that had long been viewed as outside the scope of the FLSA. *See, e.g.*, *Christopher*, 132 S. Ct. at 2167-68. It may be possible for unlawful employment practices to escape detection for decades on end, but the far more plausible view is that the employers have been left alone because their practices simply do not violate the FLSA.

Moreover, the lack of uniformity is especially troubling in the FLSA context because of the availability of nationwide FLSA collective actions. Because plaintiffs may file collective action claims in the most plaintiff-friendly forum, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for any dealership that has operations within the Ninth Circuit. Certiorari is plainly warranted to restore national uniformity to this important area of the law.

I. The Ninth Circuit's Decision Openly Conflicts With The Decisions Of Several Other Courts And Is Wrong On The Merits.

A. The Ninth Circuit's Decision Squarely Conflicts With Decisions of the Fourth and Fifth Circuits and the Montana Supreme Court.

In a stark departure from a previously unbroken line of authority, the Ninth Circuit held that service advisors are not exempt from the FLSA's overtime-pay requirements. The court readily acknowledged that its decision "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the

Supreme Court of Montana," and noted that it "respectfully disagree[s]" with the reasoning of those cases. Pet.App.11-12. There is thus no serious question that the lower courts are divided over the meaning of §213(b)(10)(A).

1. In *Walton v. Greenbrier Ford*, 370 F.3d 446, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The *Walton* plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs, [] keep customers informed about maintenance, [and] suggest to customers additional services that needed to be performed." *Id.* at 449.

Under the plain text of §213(b)(10)(A), the Fourth Circuit concluded that service advisors were "salesm[e]n ... primarily engaged in servicing automobiles." *Id.* at 453. Service advisors are an "integral part of the dealership's servicing of automobiles" because they are the "first line ... service sales representative[s]." *Id.* at 452-53. Their role was to figure out what services the customer needed, prepare cost estimates, and sell both necessary repair services and supplemental services. *Id.* The court thus concluded that those employees were salesmen "primarily engaged in servicing automobiles." *Id.*

The Fourth Circuit also held that DOL's interpretation of the exemption in its 1970 interpretive regulation was "unreasonable" because it is "an impermissibly restrictive construction of the statute." *Id.* at 452. Under DOL's view, a salesman would be covered by the exemption only if he were

primarily engaged in *selling vehicles*. But, as the Fourth Circuit explained, that interpretation effectively ignores the second half of the disjunctive clause "selling *or servicing* automobiles." 29 U.S.C. §213(b)(10)(A) (emphasis added). The court refused to defer to DOL's "restrictive regulatory definition" because it "unreasonably implements the congressional mandate." 370 F.3d at 452.

Similarly, in *Deel Motors*, 475 F.2d 1095, the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt from the FLSA. Under the plain text of the exemption, the court concluded that service advisors were "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And the court further noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus had little difficulty concluding that service advisors were exempt under §213(b)(10)(A), notwithstanding DOL's arguments to the contrary.

Several other courts have reached the same conclusion. In *Thompson*, 294 P.3d 397, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors at car dealerships. *Id.* at 402. The court found no ambiguity in the relevant statutory

text because "[a] plain, grammatical reading of 29 U.S.C. §213(b)(10)(A) makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* The court added that "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic,' who [is] primarily engaged in either of these duties." *Id.*

The federal district courts that have addressed this issue have also uniformly concluded that the exemption in §213(b)(10)(A) applies to service advisors at car dealerships. *See, e.g., Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975). The district court here likewise held that service advisors were exempt. *See* Pet.App.29. Thus, describing this case as presenting an acknowledged circuit split substantially understates matters. The Ninth Circuit expressly parted company with *every* other court to consider the question.

2. The Ninth Circuit readily acknowledged that its decision "conflicts with" the decisions cited above, *Id.* at 11. It had no choice. Respondents perform the exact same job functions as the service advisors in the cases cited above, yet the Ninth Circuit found them to be non-exempt while every other court has found them to be exempt. Moreover, each of the decisions cited above rejected DOL's interpretation of the exemption

on the ground that it was an unreasonable interpretation of the statute, whereas the Ninth Circuit gave DOL's position controlling weight. *Id.* at 19 ("we must defer to [DOL's] choice"). It is difficult to imagine a clearer example of "a decision in conflict with the decision of another United States court of appeals on the same important matter," and a decision that "conflicts with a decision by a state court of last resort." S. Ct. R. 10(a).

A circuit split over the meaning of a federal statute would be undesirable under any circumstances, but the need for a uniform rule in this context is particularly critical. The FLSA provides for nationwide collective actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). Because of the availability of nationwide FLSA collective actions, the most plaintiff-friendly jurisdiction will often be able to establish the *de facto* substantive law that governs many employers throughout the entire country

Indeed, as the National Automobile Dealers Association noted in an *amicus* brief below, there are hundreds of car dealerships that operate at locations both within and outside the Ninth Circuit. As a result, even though the Ninth Circuit is the only court to have ever found service advisors to be non-exempt, that jurisdiction will likely become a forum of choice for plaintiffs seeking to challenge the exempt status of service advisors. One way or the other, the scope of a critical federal labor statute should not turn on the happenstance of the state in which a company is

operating. Certiorari is plainly warranted to restore a nationally uniform interpretation of §213(b)(10)(A).

B. The Ninth Circuit Badly Misconstrued Section 213(b)(10)(A).

It is not surprising that the Ninth Circuit is the only court to have found service advisors to be non-exempt, as the decision below is unmoored from both the text and purpose of §213(b)(10)(A).

The FLSA exempts from the overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.* The only question is whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* They plainly are, and the Ninth Circuit's reasons for holding otherwise do not withstand scrutiny.

1. Service advisors are salesmen primarily engaged in servicing automobiles.

If a statute is neither "silent [nor] ambiguous with respect to the specific issue," the statute's clear meaning controls. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). The FLSA exemption at issue here unambiguously extends to "any salesman ... primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A).

That should be the end of the matter, as a service advisor is integral to the process of servicing vehicles at a dealership, and is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." According to Respondents' own complaint, their job duties included evaluating customers' service and repair needs; suggesting services to address specific problems with the vehicles; preparing cost estimates; and offering supplemental services such as preventative maintenance. *See* Complaint ¶16 (DN 2). As the Fourth Circuit has correctly recognized, service advisors are "primarily engaged in servicing automobiles" because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representatives." *Walton*, 370 F.3d at 452-53. They are thus exempt under a straightforward textual interpretation of §213(b)(10)(A).

In holding to the contrary, the Ninth Circuit gave dispositive weight to DOL's interpretation of the exemption. According to DOL, despite the statute's disjunctive language—"any salesman, partsman, or mechanic primarily engaged in *selling or servicing* automobiles"—the exemption covers salesmen "engaged in selling" cars, but not salesmen "engaged in servicing" them. *See* 76 Fed. Reg. at 18,838 (asserting that exemption is limited to "salesmen who sell vehicles and partsmen and mechanics who service vehicles").

That interpretation flies in the face of the most basic rules of grammar. In interpreting a sentence with multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked

to each gerund as long as that noun-gerund combination has a sensible meaning. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise ...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning."). Here, there is no question that the term "or" in the phrase "salesman ... primarily engaged in selling or servicing" is disjunctive and that both gerunds can sensibly be applied to the noun "salesman." Thus, *both* parts of the disjunctive phrase "engaged in selling or servicing automobiles" can plainly be applied to the noun "salesman."

The Ninth Circuit offered two basic reasons for finding ambiguity and deferring to DOL's interpretation, but neither withstands scrutiny. First, the Ninth Circuit offered an alternative interpretation of the statute in which the words "selling" and "servicing" refer only to the specific acts of *personally* selling or servicing cars, and not to the general process of sales or service. *See* Pet.App.12-13. Under that view, because a service advisor does not personally service vehicles, he cannot be "primarily engaged in ... servicing automobiles."

That argument impermissibly injects a word into the statute and creates a significant interpretative anomaly for one of the key words that actually appears in the statutory text. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The notion that an exempt employee must be *personally* involved in servicing automobiles requires adding a restrictive modifier that is absent in the statutory text. That is problematic enough, but the word DOL would add to the statute also creates a significant textual anomaly. Partsmen are plainly exempt employees under the statute, but they do not personally engage in either selling or servicing. Instead, those workers are "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2).

There is no satisfactory answer to the anomaly that arises if the statute is interpreted as requiring direct personal involvement in servicing. It cannot seriously be contended that the exemption covers only partsmen who personally service automobiles, for that is a null set. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute or regulation must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). But if, as is clearly the case, partsmen come within the plain terms of the exemption because they are engaged in the *general process* of selling or servicing automobiles rather than personally engaged in selling or servicing automobiles, then service advisors must also come within the terms of the exemption. Indeed, if anything, the service advisors, who diagnose problems and recommend solutions are more personally involved in servicing than the plainly exempt partsmen. And no canon of construction permits interpreting the concept of servicing broadly for partsmen and narrowly for salesmen. *See, e.g.*,

FCC v. AT&T, 562 U.S. 397, 408 (2011) ("identical words and phrases within the same statute should normally be given the same meaning" throughout the statute).

Second, in attempting to conjure up ambiguity in the statutory text, the Ninth Circuit asserted that the exemption could be construed such that the noun "salesman" is modified only by "selling" rather than "selling" and "servicing." Pet.App.14-15; *see also* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles" and "mechanics who service vehicles"). The court provided two stylized analogies that, in its view, highlighted this purported ambiguity. The Ninth Circuit first presented the sentence, "if my dogs or cats are eating or drinking, then I know not to pet them." Pet.App.14. In this sentence, it is clear from the context that both "eating" and "drinking" can apply to both "dog" and "cat." The court contrasted that sentence with the sentence, "if my dogs or cats are barking or meowing, then I know that they need to be let out." *Id.* It is equally clear from the context of this sentence that "barking" applies only to dogs and "meowing" applies only to cats. Reasoning by analogy, the Ninth Circuit concluded that the phrase "salesman, partsman, or mechanic primarily engaged in selling or servicing" could be understood as akin to either the "barking or meowing" sentence or the "eating or drinking" sentence, thereby resulting in ambiguity for DOL to fill.

There are two serious problems with those examples. First, rather than demonstrating any ambiguity here, those examples simply underscore

that context matters and can provide clear answers. Neither dog/cat example is ambiguous. The first illustrates the default grammatical rule that unless the disjunctive gerund is distinct to one of the disjunctive nouns, then the gerund modifies all the nouns to which it could apply. An effort to limit that phrase to eating dogs and drinking cats would be nonsensical. Put differently, there is no ambiguity as to whether that phrase covers drinking dogs and eating cats. They are plainly covered. The second example demonstrates that the default rule can be overcome when the gerunds are by their nature limited to a particular noun. Meowing dogs and barking cats are not covered because there are no such animals. Once again, the phrase is unambiguous. But there is nothing oxymoronic or even anomalous about a salesman primarily engaged in the servicing of automobiles. That is exactly what service advisors do, and they are unambiguously covered by the exemption.

The second problem with the Ninth Circuit's example once again stems from the exemption's undeniable coverage of partsmen. Congress' inclusion of partsmen is fatal to the Ninth Circuit's theory that Congress intended to limit the application of each of the disjunctive gerunds to only one of the listed nouns. In the "dog-cat" analogy, the partsman is the figurative "horse" (or any other animal) in the sentence that confirms that the gerunds are more similar to generic "eating or drinking" than to species-particular "barking or meowing." Indeed, the FLSA exemption in §213(b)(10)(A) contains *three* nouns but only *two* gerunds, which makes it mathematically impossible to link the nouns to the gerunds on a one-

to-one basis. Context matters, and the number and positioning of the nouns and gerunds makes clear that a salesman—like a partsman or mechanic—can be "primarily engaged in ... servicing automobiles."

2. At a minimum, DOL's interpretation is unreasonable and thus not entitled to deference.

Unlike other subsections of the FLSA, Congress did not expressly delegate to DOL authority to interpret §213(b)(10)(A). *Compare, e.g.*, 29 U.S.C. §213(a)(1) (granting DOL authority to "define[] and delimit[] from time to type by regulations" the definition of "outside salesman"), *and id.* §213(b)(14) (granting DOL authority to define the phrase "area of production"), *with id.* §213(b)(10)(A) (no comparable grant of authority). Accordingly, DOL's regulation is not a legislative regulation, but merely an interpretive one. *See Chevron*, 467 U.S. at 843-44. Interpretive regulations are accorded less deference than legislative regulations, and may be upheld by a court only if they "implement the congressional mandate in a reasonable manner." *Walton*, 370 F.3d at 452; *see also* Pet.App.29 ("mere interpretation" is "accorded lower deference").

DOL's interpretation of §213(b)(10)(A) plainly fails that test. All of the arguments for why the text of the exemption is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is unreasonable. *See Walton*, 370 F.3d at 452 (finding DOL interpretation to be "unreasonable, as it is an impermissibly restrictive interpretation of the statute").

Moreover, DOL's flimsy justification for reversing its interpretation of §213(b)(10)(A) in 2011 only compounds the unreasonableness of its position and the inappropriateness of substantial deference. For nearly 40 years, service advisors and car dealerships have negotiated mutually beneficial compensation plans in good-faith reliance upon DOL's oft-repeated assertion that service advisors were exempt employees. *See* DOL 1978 Opinion Letter, 1978 WL 51403 (service advisors exempt from FLSA as long as their sales are primarily for non-warranty service). Yet DOL purported to change that longstanding interpretation in 2011 based on the very same counter-textual reading of §213(b)(10)(A) that a number of courts had already rejected. *See* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles and partsmen and mechanics who service vehicles"). That specious justification falls far below the type of reasoned decisionmaking expected of an agency before it upends a policy that "has engendered serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (under *Chevron*, a "change that does not take account of legitimate reliance on prior interpretation[s] ... may be 'arbitrary, capricious [or] an abuse of discretion'").

In all events, DOL's position must be rejected regardless of the level of deference it receives. In addition to the significant textual flaws discussed above, treating service advisors as non-exempt makes little sense in the broader scheme of the FLSA. The FLSA contains numerous provisions (in addition to §213(b)(10)(A)) that are designed to exclude from the mandatory overtime rules individuals who are

engaged in sales or paid by commission. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions reflect the basic reality that it is both common and reasonable for salesmen to be compensated based on their *success at selling*, rather than the sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*, 475 F.2d at 1097. Like countless other salesmen who are treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* Forcing an employer to pay service advisors—who are quintessential salesmen—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *Cf. Christopher*, 132 S. Ct. at 2173 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

Finally, DOL's interpretation also forces dealerships to differentiate among their employees in ways that are contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-

exempt, there might be a boundary question on which DOL was due some deference. But here DOL has seized on the fact that service advisors are a hybrid between two *fully exempt* categories as a ground for deeming them non-exempt. That interpretation makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

3. The Ninth Circuit erred by holding that FLSA exemptions should be interpreted "narrowly."

Finally, the Ninth Circuit buttressed its untenable conclusion by relying heavily on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees," and that "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro*, 745 F.3d at 1256). Indeed, the Ninth Circuit effectively applied a clear statement rule, holding that employees must be treated as subject to the FLSA's overtime rules unless they "plainly and unmistakably" fall within an exemption. *Id.* (quoting *Solis*, 656 F.3d at 1083).

That purported canon of construction is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly. *See, e.g.*, *OWCP*, 514 U.S. at 135-36 (describing broad-construction canon as "that last redoubt of losing causes"). But applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. The goal of a court interpreting a statute "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of*

Contemporary Legal Analysis, 40 Case W Res. L. Rev. 581, 582 (1990). Thus, in addition to addressing the circuit split concerning the meaning of §213(b)(10)(A), granting plenary review would give this Court an opportunity to clarify that the FLSA should be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Dealerships And Will Inject Uncertainty Into A Previously Settled Area Of The Law.

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car dealerships employ an estimated 45,000 service advisors. Based on decades of settled precedent treating those employees as exempt, service advisors and dealerships negotiated compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now concluded that this entire arrangement has been unlawful all along.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 132 S. Ct. at 2168. The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability

(including back pay and double damages). *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *Christopher*, 132 S. Ct. at 2170-74 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *see also Yi*, 480 F.3d at 510-11 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing").

Those concerns are at their zenith in cases like this and *Christopher* where the plaintiffs seek to have employees who were actually paid on a commission-basis retroactively reclassified as non-exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 132 S. Ct. at 2173 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). And, of course, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily negotiated, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in DOL's approach. Under the approach adopted by every other court to consider the

issue, all sales employees are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other salespeople (or others engaged in providing service, such as partsmen or mechanics), a huge windfall. Those windfalls cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with anomalous divisions among their salesforces going forward.

Finally, as noted above, because the FLSA provides for nationwide collective actions, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for all dealerships that have at least some operations within the Ninth Circuit. Thus, this is not a case in which further percolation of the relevant issues would be helpful or desirable. The far better course is to grant certiorari immediately to restore uniformity to this important area of the law and reaffirm what numerous courts have held since the 1970s—that service advisors are exempt from the FLSA's overtime rules under the plain text of 29 U.S.C. §213(b)(10)(A).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

KARL R. LINDEGREN
TODD B. SCHERWIN
COLIN P CALVERT
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1590
Los Angeles, CA 90071
213-330-4450

WENDY MCGUIRE COATS
MCGUIRE COATS LLP
3527 Mt. Diablo Blvd., #281
Lafayette, CA 94549
925-297-6415

Counsel for Petitioner

September 30, 2015

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

Argued: February 11, 2015
Filed: March 24, 2015

OPINION

Before: Susan P Graber and Kim McLane Wardlaw, Circuit Judges, and James C. Mahan,* District Judge.

GRABER, Circuit Judge:

We consider here a question of first impression for our circuit: Are "service advisors" who work at a car dealership exempt from the overtime pay

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

requirements of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219, under 29 U.S.C. § 213(b)(10)(A), which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"? Reviewing de novo, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014), *petition for cert. filed*, __U.S.L.W __ (U.S. Jan. 26, 2015) (No. 14-920), we answer that question "no" and, accordingly, reverse the district court's holding to the contrary.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." The complaint alleges:

> The job duties and obligations of Service Advisors ... are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service deeds of the vehicle, the Service Advisors ... then solicit and suggest[] that certain service[s] be conducted on the vehicle to remedy the complaints of the vehicle owner

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[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

> by conducting certain repairs at [Defendant's dealership] and through [Defendant's] own mechanics. The Service Advisors ... are also duty bound and obligated by [Defendant] to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors ... then write up an estimate for the repairs and services and provide[] that to the vehicle owner. The vehicle is then taken to the mechanics at [Defendant] for repair and maintenance.
>
> As required by [Defendant] and oftentimes while the vehicle is with [Defendant's] mechanics, the Service Advisors ... will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

Defendant pays service advisors on a commission basis only; Plaintiffs receive neither an hourly wage nor a salary.

In 2012, Plaintiffs filed this action alleging, among other things, that Defendant has violated the FLSA by failing to pay overtime wages. The district court dismissed the overtime claim because, the court concluded, Plaintiffs fall within the FLSA's exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Plaintiffs timely appeal.[2]

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[2] The court dismissed Plaintiffs' other federal claims (claims 3, 5, and 7) on alternative grounds not challenged on appeal. For

DISCUSSION

Title 29 U.S.C. § 207(a)(1) requires that employers pay time-and-a-half for hours worked in excess of 40 per workweek. But § 213(b)(10)(A) provides that "[t]he provisions of section 207 of this title shall not apply with respect to ... any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Defendant, as a car dealership, is a "nonmanufacturing establishment primarily engaged in the business of selling ... vehicles ... to ultimate purchasers." *Id.* The question is whether each Plaintiff is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.*

Plaintiffs argue that we must defer to the United States Department of Labor's 2011 regulatory definitions, set out at 29 C.F.R. § 779.372(c). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011). Those regulations state, in relevant part:

> Salesman, partsman, or mechanic.
>
> (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts

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that reason, we affirm the court's dismissal of those claims. The court also exercised its discretion under 28 U.S.C. § 1367(c) to dismiss Plaintiffs' state-law claims for lack of supplemental jurisdiction. Because we reverse the dismissal of the overtime claim (claim I), we also reverse the dismissal of the state-law claims.

> for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling....
>
> (2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.
>
> (3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such....

29 C.F.R. § 779.372(c). As the agency explained in 2011, the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Because Plaintiffs do not fit within any of those definitions, they are not exempt from the FLSA's overtime wage provisions. Defendant concedes that Plaintiffs do not meet the regulatory definitions, but counters that we should not defer to the regulation.

We conduct the familiar two-step inquiry to determine whether to defer to the agency's interpretation. *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 160 (2014). "At step one, we ask 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron, U.S.A, Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 842 (1984)). If so, then the inquiry is over, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. But if the statute is silent or ambiguous, then we must determine, before step two, what level of deference applies. *McMaster*, 731 F.3d at 889. "If we determine that *Chevron* deference applies, then we move to step two, where we will defer to the agency's interpretation if it is 'based on permissible construction of the statute'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

A. At *Chevron* Step One, the Statute is Ambiguous.

When construing a congressional enactment, "our inquiry begins with the statutory text." *BedRoc Ltd. v. United States*, 541. U.S. 176, 183 (2004). In addition, in the present context we must apply the background rule that "[t]he FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir.), *cert. denied*, 135 S. Ct. 138 (2014). "FLSA exemptions ... are to be withheld except as to persons plainly and unmistakably within their terms and spirit."[3] *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). "An employer who

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[3] The rule that courts should construe the FLSA's exemptions narrowly originated in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). In recent years, the Supreme Court has clarified that the presumption applies only to the exemptions in § 213 and not more generally. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012).

claims an exemption from the FLSA bears the burden of demonstrating that such an exemption applies." *Id.* (internal quotation marks omitted).

As noted, the statute exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The statute does not define the terms "salesman, partsman, or mechanic." Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit," *Solis*, 656 F.3d at 1083 (internal quotation marks omitted).

It is plausible to read the term "salesman" broadly and to connect the term to "servicing automobiles"; that is, one could consider a service advisor to be a "salesman ... primarily engaged in ... servicing automobiles." But, as explained in more detail below, in Part C, it is at least as plausible to read the nouns in a more cabined way: a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars. Service advisors do none of those things; they sell services for cars. They do not sell cars; they do not stock parts; and they do not perform mechanical work on cars.

It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves. Certainly Congress did not exempt all employees of a car dealership; for example, a

bookkeeper who tracks invoices for car sales and servicing is plainly not exempt, nor is a secretarial employee who routes calls to the salesmen, partsmen, and mechanics. Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro*, 745 F.3d at 1256.

In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

B. *Chevron* Provides the Appropriate Lens.

When a statute is ambiguous, then we must determine, "prior to step two," the appropriate standard: either the *Chevron* test of reasonableness or a lower standard under *United States v. Mead Corp.*, 533 U.S. 218 (2001). *McMaster*, 731 F.3d at 889. Because we consider here a regulation duly promulgated after a notice-and-comment period, *Chevron's* "reasonableness" standard applies. *See*, e.g., *Renee v. Duncan*, 623 F.3d 787, 795 (9th Cir. 2010) ("The challenged federal regulation interprets a federal statute. The regulation was adopted by the responsible federal agency through notice and comment rulemaking. We therefore apply the analytical framework outlined in *Chevron*.").

Nothing in the history of the regulation undermines that conclusion. Indeed, the original version of the regulation, promulgated in 1970, contained the same narrow definitions of "salesman," "partsman," and "mechanic." *See* 29 C.F.R.

§ 779.372(c)(1)-(3) (1970); *see also* Dep't of. Lab., Wage & Hour Div., Opinion Letter No. 660, 66-69 Lab. Cas. (CCH)¶ 30,652 (Aug. 4, 1967) (also providing the same narrow definitions). Those regulatory definitions have not changed in any relevant way since 1970. Because the agency's formal, regulatory position has not changed, the cases cited by Defendant are not on point. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012), the Supreme Court addressed what level of deference to give to an agency's interpretation of its own regulations. Importantly, the parties agreed that "the regulations themselves ... [were] entitled to deference under *Chevron*." *Id.* Similarly, *U.S. Steel*, 678 F.3d at 598-99, involved only opinion letters; the agency had not issued formal regulations.

It is true that the Department of Labor occasionally has adopted the broader definitions, urged by Defendant here, in documents other than regulations. For example, the agency issued an opinion letter in 1978 that defined a "salesman" to encompass service advisors. Dep't of Lab. Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978). Similarly, the agency amended its Field Operations Handbook in 1987 along the same lines. Field Operations Handbook, Dep't of Lab., Wage & Hour Div., 24L04-4, Insert No. 1757 (Oct. 20, 1987).

The agency even proposed amending the formal regulation to adopt the broader definitions. 73 Fed. Reg. 43,654-01, 43,658-59, 43,671 (July 28, 2008). But it ultimately decided *against* making that change after receiving comments from the public and considering the relevant court decisions. 76 Fed. Red. at 18,838.

The agency "acknowledge[d] that there are strongly held views on several of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes in developing this final rule." *Id.* at 18,832. The regulatory history shows that the Department of Labor has given this particular issue considerable thought and has concluded that the better reading of the statute is to "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

Moreover, even if we were to consider the agency's 2011 final rule a change of position, we still would conclude that *Chevron* supplies the appropriate standard of deference. As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), an agency is permitted to change its position. Consistent with *Fox*, the agency here expressly acknowledged that its position was contrary to its earlier opinion letter, and the agency rationally explained why, in its view, the court decisions to the contrary were erroneous. Under *Fox*, 556 U.S. at 515-18, nothing more is required. *Cf. Perez v. Mortg. Bankers Ass'n*, No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015) (holding that an agency may change its position in an interpretive rule without notice and comment).

The Department of Labor's regulations consistently—for 45 years—have interpreted the statutory exemption to apply narrowly. The agency reaffirmed that interpretation most recently in 2011, after thorough consideration of opposing views and after a formal notice-and-comment process. Under

these circumstances, *Chevron* provides the appropriate legal standard.

C. At *Chevron* Step Two, the Regulation is Reasonable.

"Under *Chevron* step two, if the agency's interpretation is a reasonable one, this court may not substitute its own construction of the statutory provision." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (brackets and internal quotation marks omitted). Here, the Department of Labor has interpreted the statutory exemption to exclude service advisors by choosing the narrower definition of the term "salesman." For the reasons described below, we conclude that the agency has made a permissible choice. The interpretation accords with the presumption that the § 213 exemptions should be construed narrowly. *Haro*, 745 F.3d at 1256. Moreover, we are mindful of our role as a reviewing court: "The agency's interpretation need not be the best construction of the ambiguous statute." *Cervantes v. Holder*, 772 F.3d 583, 591 (9th Cir. 2014).

We recognize that our decision to uphold the agency's interpretation conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Brennan v. N. Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975) (unpublished), *aff'd sub. nom Dunlop v. N. Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (table); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975) (unpublished); *Yenney v. Cass Cnty. Motors Co.*,

No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977) (unpublished); *Thompson v. J. C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). We respectfully disagree with those decisions.

In *Deel Motors* and the district court opinions following that case in the 1970s, courts held that service advisors are exempt because their duties and pay structure are "functionally similar" to those of the salesmen, partsmen, and mechanics whom the statute expressly exempts. 475 F.2d at 1097 But those cases pre-dated *Chevron* and the modern framework for deferring to an agency's interpretation. *See id.* (asking not whether the agency's interpretation was reasonable but, instead, determining for itself "the best interpretation," "the better reasoned interpretation," and "a common sense interpretation"); *see also id.* at 1098 (concluding that "[t]he intended scope of [the exemption] is not entirely clear" but not considering deference to the agency's position). In that regard, we agree with the Fourth Circuit that "[the] 'functionally similar' inquiry cannot be squared with FLSA's plain statutory and regulatory language." *Walton*, 370 F.3d at 451. Nothing in the statutory text suggests that Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties and pay structure; the text exempts only certain salesmen, partsmen, and mechanics.

The closer question is whether the agency's interpretation is unreasonable because it is unduly restrictive, as the Fourth Circuit held in *Walton* and

the Montana Supreme Court held in *Thompson*.[4] Those courts read § 213(b)(10)(A) as follows: "any salesman, partsman, or mechanic primarily engaged in [the general business of] selling or service automobiles." Service advisors are "salesmen" because their job is to sell services for cars. And service advisors are involved in the general business of "servicing automobiles," because their role is to help customers receive mechanical work on their cars. Accordingly, service advisors fall within the statutory definition. In effect, those courts held that that is the only reasonable reading of the statute.

The agency reads the statute differently: "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles." Service advisors may be "salesmen" in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition. In effect, the agency reads the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.

The Fourth Circuit rejected that interpretation as unreasonable because, with respect to "salesman," it purportedly reads out of the statute the second half of the disjunctive clause "'selling *or servicing automobiles*.'" *Walton*, 370 F.3d at 452 (emphasis by *Walton*) (quoting § 213(b)(10)(A)); *see also Thompson*, 294 P.3d at 402 ("A plain, grammatical reading of [the statute] makes clear that the term 'salesman'

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[4] *Walton* considered the issue at *Chevron* step two, whereas *Thompson* considered the issue at *Chevron* step one. Otherwise, the reasoning of both courts is largely the same.

encompasses a broader category of employees than those only engaged in selling vehicles" because of "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing'"). The Fourth Circuit's point is that, when Congress uses a list of disjunctive subjects (here, "salesman, partsman, or mechanic") followed by a list of disjunctive verbs (here, "selling or servicing"), the ordinary interpretation of that construction is that each subject is linked with each verb. For example, if someone says, "if my dogs or cats are eating or drinking, then I know not to pet them," we understand that phrase to be all-encompassing: the speaker refrains from petting a dog that is eating or drinking and a cat that is eating or drinking. It would contravene the speaker's intent to include, for example, only cats that were eating but to exclude dogs that were eating.

Critically, however, that analysis depends on context. Consider this slightly modified hypothetical: "if my dogs or cats are barking or meowing, then I know that they need to be let out." The Fourth Circuit's grammatical interpretation of that phrase would include a meowing dog and a barking cat. But most English speakers would interpret the sentence to refer only to a barking dog and a meowing cat. At a minimum, that implicit limitation would offer a reasonable interpretation of the speaker's intent.

Returning to the statute at hand, the agency's interpretation is reasonable. A natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects. For example, it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in

selling ... automobiles." That is, it seems that Congress intended the subject "mechanic" to be connected to only one of the two verb clauses, "servicing." The nature of the word "mechanic" strongly implies the actions that the person would take—servicing. *See American Heritage College Dictionary* 842 (3d ed. 2000) (defining "mechanic" as a "worker skilled in making, using, or repairing machines, vehicles, and tools"). The same can be said of the subject "salesman." It is hard to imagine, in ordinary speech, "salesman ... primarily engaged in ... servicing automobiles." Congress likely intended the subject "salesman" to be connected to only one of the two verb clauses, "selling." The nature of the word "salesman" strongly implies the actions that the person would take—selling. *See id.* at 1203 (defining "salesman" as a "man who sells merchandise").

It is important to note that the agency's reading does not render any term meaningless or superfluous. All three subjects (salesman, partsman, and mechanic) and both verbs (selling and servicing) retain meaning; it is just that some of the verbs do not apply to some of the subjects. If the agency read out a word altogether, its interpretation likely would be unreasonable. *See, e.g., Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir. 2013) ("It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous."), *cert. denied*, 134 S. Ct. 906 (2014). But the regulation does not run afoul of that doctrine.

Non-textual indicators of congressional intent, such as legislative history, are inconclusive. *See*

Fournier v, Sebelius, 718 F.3d 1110, 1123 (9th Cir. 2013) (holding that, at *Chevron* step two, "legislative history permissibly may be considered"), *cert. denied*, 134 S. Ct. 1501 (2014). We have found no mention, in the relevant reports or hearings, of service advisors, by name or by role. All references to "salesman" appear to refer to an employee who sells cars only. *See, e.g.*, 112 Cong. Rec. S20,504 (Aug. 24, 1966) (statement of Sen. Yarborough) ("It would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different.").

In 1961, Congress exempted "any employee" of a car dealership. 29 U.S.C. § 213(a)(19) (1961); Pub. L. No. 87-30, § 9, 7S Stat. 65 (1961). A few years later, the Eighty-Ninth Congress considered three bills on this topic. The first bill, introduced in 1965, would have repealed altogether the exemption for employees of dealerships. H.R. 8259, 89th Cong. § 305 (introduced in House on May 18, 1965). The next bill, also introduced in 1965, would have exempted from overtime requirements "any salesman or mechanic employed by" a car dealership. H.R. 10,518, 89th Cong. § 209 (introduced in House on Aug. 17, 1965); H.R. 10,518, 89th Cong. § 209 (reported in House on Aug. 25, 1965). Neither of those bills passed.

The final bill—H.R. 13,712—was enacted into law on September 23, 1966.[5] The first three versions,

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[5] Defendant cites recent actions by the House of Representatives' Committee on Appropriations in an apparent

introduced in the first half of 1966, exempted either "any salesman or mechanic" or "any salesman, mechanic, or partsman" employed by a car dealership. H.R. 13,712, 89th Cong. § 209 (introduced in House on Mar. 16, 1965); *id.* (reported in House on Mar. 29, 1966); *id.* (referred in Senate on May 27, 1966). The final three versions all qualified the list of employees with the phrase, "primarily engaged in selling or servicing automobiles." *Id.* (reported in Senate on Aug. 23, 1966); *id.* (ordered to be printed in Senate on Aug. 25, 1966); Pub. L. No. 89-601 (Sept. 23, 1966). We know. then, that sometime in 1966 between May 27 and August 23, the Senate added that phrase. Unfortunately, the legislative history is silent on its meaning. *See, e.g.*, 112 Cong. Rec. H21,940 (Sept. 7, 1966) (House Conference Report: "The conference substitute conforms to the House provision regarding partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles."); 112 Cong. Rec. S22,651 (Sept. 14, 1966) ("The resulting language follows the House exemption— including the Senate floor amendment— but with a somewhat narrower scope."); Sen. Comm.

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attempt to prevent enforcement by the agency of the 2011 rule. That appropriations rider is not relevant. What one house of Congress thinks, in the 2010s, about enforcement priorities for the agency is entirely uninformative about the intent of Congress when it enacted a statute in 1966. Moreover, enforcement priorities do not change the content of the statute. If the Appropriations Committee were to instruct, for instance, that it did not want money spent on enforcing the statutes forbidding cultivation of fewer than five marijuana plants on federal lands, such cultivation would not become lawful.

on Lab. & Pub. Welf., Report: No. 1487, p. 14, 89th Cong. (Aug. 23, 1966) ("Committee Report") ("Section 13(b) is amended to provide an overtime exemption for salesmen and mechanics who are primarily engaged in selling or servicing automobiles....").

The only possible exception, noted by *Deel Motors*, 475 F.2d at 1097 n.2, is found in the Committee Report on August 23, 1966:

> It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

Committee Report at 32. The Fifth Circuit quoted selectively from that passage for the proposition that the committee intended to exempt all mechanics and salesmen. *Deel Motors*, 475 F.2d at 1097 n.2. But the quoted passage also is found in earlier committee reports, which were written *before* the limiting phrase was added. *E.g.*, Sen. Comm. on Educ. & Lab., Report No. 871, p. 38, 89th Cong. (Aug. 25, 1965). Because the passage appeared both before and after the addition of the "primarily" proviso, the best reading of that passage is that the committee was addressing what

provisions apply to employees who work in separate buildings, not what types of salesmen are exempt.

In sum, there are good arguments supporting both interpretations of the exemption. But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice. *Chevron*, 467 U.S. at 844. Accordingly, we hold that Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).

Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55323

HECTOR NAVARRO; ET AL.,

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO,

Defendant-Appellee.

Filed: June 1, 2015

ORDER

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,* District Judge.

Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

Appellee's petition for rehearing en banc is DENIED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

NAVARRO, ET AL.,

Plaintiffs

v.

MERCEDES BENZ OF ENCINO,

Defendant.

Filed: January 25, 2013

(IN CHAMBERS) ORDER RE: DEFENDANT'S MOTION TO DISMISS

R. Gary Klausner, United States District Judge.

I. Introduction

On September 18, 2012, Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro (collectively "Plaintiffs") filed this complaint alleging nine claims against Mercedes Benz of Encino ("Defendant") for various violations of the Fair Labor Standards Act ("FLSA") and the California Labor Code.

On November 16, 2012, Defendant filed this Motion to Dismiss. The Court reviews Defendant's Motion to Dismiss as to four of the nine claims: (1) First Claim: violation of FLSA 29 U.S.C. § 207 for failure to pay overtime wages,[1] (2) Third Claim: violation of FLSA 29 U.S.C. § 206 for failure to pay minimum wage, (3) Fifth Claim: violation of FLSA 29 U.S.C. § 207 for failure to provide extra compensation for work completed during mandatory meal and rest periods, and (4) Seventh Claim: violation of FLSA 29 U.S.C. § 211 for failure to provide a written, itemized statement detailing hours worked and compensation received.

For the reasons stated below, the Court GRANTS Defendant's Motion to Dismiss. Additionally, the remaining claims are state claims over which the Court will not exercise supplemental jurisdiction. Therefore, the Court dismisses those claims for lack of subject matter jurisdiction.

II. Factual Background

With the exception of Plaintiff Reuben Castro, Plaintiffs are all current employees of Defendant. Plaintiff Reuben Castro is a former employee. Defendant owns and operates a Mercedes Benz automobile dealership in Encino, California. This business sells and services both new and used Mercedes Benz automobiles. Plaintiffs work (or have worked) at the dealership as Service Advisors.

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[1] The Court notes that Plaintiffs' Complaint alleges a violation of 29 U.S.C. § 201; however, the proper statutory basis for the allegations asserted in the first claim is 29 U.S.C. § 207.

As Service Advisors, the Plaintiffs must: (1) meet and greet Mercedes Benz owners as they enter the service area and evaluate their service and repair needs; (2) solicit service to be conducted on the vehicle; (3) solicit supplemental service to be performed on the vehicle; and (4) inform the vehicle owner about the status of the vehicle while Defendant's mechanics repair and service the vehicle. For every additional service or repair provided, the commission increases. Defendant pays Service Advisors, such as Plaintiffs, solely on this commission.

On September 18, 2012, Plaintiffs filed a complaint against Defendant alleging violations of both federal and state laws for failure to pay overtime, failure to pay minimum wage, failure to provide extra compensation for Plaintiffs' work during mandatory meal and rest periods, and failure to provide itemized wage statements to Plaintiffs. Additionally, Plaintiffs allege that because of these practices, Defendant has engaged in unfair competition in violation of California Business & Professions Code §17200.

III. Judicial Standard

To comply with Federal Rules of Civil Procedure 8, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Rule 12(b)(6), a party may move to dismiss a claim for failure to allege enough facts to comply with Rule 8.

In deciding a Rule 12(b)(6) motion, a court must assume allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F 3d 336, 337-38 (9th Cir.

1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). The complaint need not contain detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a claim." *Twombly*, 550 U.S. at 555.

IV Discussion

Defendant argues Plaintiffs' claims should be dismissed for the following reasons: (1) Plaintiffs' First, Third, and Fifth Claims fail because Plaintiffs are exempt from the FLSA's maximum hour and minimum wage requirements; (2) alternatively, Plaintiffs' Third Claim fails because the Complaint pleads insufficient facts; (3) alternatively, Plaintiffs' Fifth Claim fails because § 207 does not require meal and rest periods; and (4) Plaintiffs' Seventh Claim fails because a violation of § 211 does not create a private right of action. The Court agrees.

A. First, Third, Fifth Claims Fail Based on Exemptions

Section 206 states, in pertinent part, that every employer shall pay to each of his employees not less than $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). Section 207 states no employer shall employ any employee for a workweek longer than forty hours unless the employee receives additional compensation specified at a rate not less than one-half the regular rate at which the employer generally pays the employee. 29 U.S.C. §207(a).

Section 213 creates an exemption to the above provision for "any salesman, partsman, or mechanic

primarily engaged in selling or servicing automobiles ... if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Courts have applied this exemption to Service Advisors. See *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973) ("... a common sense interpretation and application of this exemption mandates inclusion of service salesmen within its scope."); *Walton v. Greenbrier Ford*, 370 F.3d 446, 453 (4th Cir. 2004).

The Department of Labor ("DOL"), however, has expressly rejected this interpretation. The DOL defines a salesman as an employee "primarily engaged in making sales or obtaining orders or contracts for sale of automobiles." 29 C.F.R. § 779.372(c)(1). A mechanic is an employee "primarily engaged in doing mechanical work in the servicing of an automobile." 29 C.F.R. § 779.372(c)(3). In a "final rule," the Wage and Hour Division of the DOL explained that "[t]he Department notes that current § 779.372(c)(1) ... limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832-01 (April 5, 2011). Thus, under the DOL's enforcement of § 213(b)(10)(A), Service Advisors are not exempt from the hour/wage requirements set forth in §§ 206 and 207

Given the conflicting interpretations, the Court must first look to the statutory language. Where the statutory language is clear, the Court is bound by such language as a clear expression of legislative intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, 467 U.S. 837, 842-43 (1984). Where the statutory language is ambiguous, however, the Court accords deference to the DOL action based on the nature of that action. "Legislative regulations" are given a high level of judicial deference, and will stand unless arbitrary or capricious. *Id.* at 844. Mere "interpretations," however, are accorded lower deference, and will stand only so long as they are reasonable. *Id.*

1. The Statutory Language is Ambiguous as Applied to Service Advisors

Here, the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors. However, the job description of a Service Advisor encompasses those of both a salesman and a mechanic, and falls squarely within the category of positions exempted by the provision. The legislative history demonstrates an intent to "narrow significantly the reach of the automobile dealership employee exemption." *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001). Nonetheless, it is not clear that Congress intended Service Advisors to be excluded, particularly when their job duties are simply a hybrid of two jobs expressly listed within the exemption. For this reason, the Court finds § 213(b)(10)(A) ambiguous as applied to Service Advisors. See *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973) ("The intended scope of [the exemption] is not entirely clear. Indeed, the Secretary's own interpretation of the coverage of that section is not altogether consistent.").

2. The DOL's Interpretation is not Reasonable

In light of the finding above, the Court's role is to "determine whether the agency's interpretation is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As previously stated, the permissiveness of the agency's construction depends upon the nature of the agency action, as allowed by Congress. When Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency." *Id.* at 844. In such a case, agency decisions are "legislative regulations" that are given "controlling weight unless they are arbitrary. capricious, or manifestly contrary to the statute." *Id.* When Congress has not left such an explicit gap, agency actions are mere interpretations that are upheld only if reasonable. *Id.*

Within the § 213 arena, the U.S. Supreme Court has found agency action to constitute "legislative regulation." See *Auer v. Robbins*, 519 U.S. 452 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). However, in those cases, the specific provisions being reviewed expressly grant the Secretary of Labor the power to "defin[e] and delimi[t]" the terms in the section. *Id.* As such, the Court found that the statute creates an explicit gap for the agency to fill. *Id.* at 172. This case is distinguishable. Here, the applicable section, § 213(10)(b)(A), does not contain any such language. It is clear that where Congress intended to grant the agency power to create legislative regulation, it included language to that effect. In the absence of similar language, this Court will not read into the statute the grant of such power. Therefore, the

Court finds that the agency action is not a legislative regulation, but rather, a mere interpretation, which is accorded lower deference.

Having established that the DOL's action is an interpretation, the Court is bound to the DOL interpretation only if the interpretation is reasonable. *Chevron*, 467 U.S. at 844. The Court agrees with both the Fourth and Fifth Circuits, and holds that the DOL interpretation of § 213(b)(10)(A) is unreasonable. When faced with facts nearly identical to those of the present case, the Fourth Circuit concluded that the "Secretary's interpretation of ... [salesman] is unreasonable, as it is an impermissibly restrictive construction of the statute." *Walton*, 370 F.3d at 452. Similarly, the Fifth Circuit explained that "[i]n the absence of clear intent to the contrary, we cannot assume that Congress intended to treat employees with functionally similar positions differently." *Brennan*, 475 F.2d at 1097-98. Service Advisors, such as Plaintiffs, are functionally equivalent to salesmen and mechanics and are similarly responsible for the "selling and servicing" of automobiles. Accordingly. the Court finds the DOL's interpretation unreasonable. As such, the Court finds that Service Advisors fall within the exemption of § 213(b)(10)(A).

The Court dismisses Plaintiffs' first, third, and fifth claims, which all allege violations of §§ 206 and 207

B. Third Claim Fails to Allege Sufficient Facts

As discussed above, the minimum wage requirements established in § 206 do not apply to Plaintiffs because Service Advisors are exempt under § 213(b)(10)(A). Even if they did apply, however,

Plaintiff's Third Claim fails to plead sufficient facts to survive a Rule 12(b)(6) Motion.

Legal conclusions alone, without some factual allegations, do not provide fair notice of the nature of the claim nor the grounds on which the claim rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556. Here, Plaintiffs allege only that Defendant (1) failed to provide an hourly wage, (2) paid Plaintiffs on a pure commission basis, (3) required Plaintiffs to work for wages less than the legal minimum, and (4) refused to pay minimum wages. A salary based solely on commission can still satisfy the minimum wage requirement. See 29 C.F.R. § 778.117. No facts demonstrate that the commissions Plaintiffs earned do not satisfy the minimum wage requirements. Even if a Motion to Dismiss is not designed to correct inartistic pleading, as Plaintiff argues, these legal conclusions alone are insufficient to survive a Rule 12(b)(6) Motion.

C. Fifth Claim Fails to State a Claim

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with overtime compensation in violation of § 207, this Section does not apply to Service Advisors. As discussed above, Plaintiffs are exempt under § 213(b)(10)(A).

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with meal or rest periods, neither § 207 nor the cited DOL regulations mandate rest and meal periods. Section 785.18 simply states that: "Rest periods of short duration, running from 5 minutes to about 20 minutes... must be counted as hours worked." 29 C.F.R.§ 785.18. Section 785.19 states that "[b]ona fide meal periods are not worktime

... The employee must be completely relieved from duty for the purposes of eating regular meals ... The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19. These statutes simply determine when employees must be compensated for working during these periods, but do not require an employer to provide their employees with meal or rest periods. On this ground, the Court dismisses Plaintiff's Fifth Claim.

D. Seventh Claim Fails Because § 211 Does Not Create a Private Right of Action

Section 29 U.S.C. § 211 states: "Every employer subject to any provision of this chapter ... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records..." Section 217 authorizes only the Secretary to initiate injunction proceedings involving an employer's failure to comply with the record keeping requirements. 29 U.S.C. § 217 Put simply, § 211(c) does not create a private action against an employer for failure to comply with the record-keeping provisions. *Elwell v. University Hospitals Home Care Services*, 276 F. 3d 832, 843 (6th Cir. 2002). Therefore, the Court dismisses Plaintiff's Seventh Claim.

E. The Remaining State Law Causes of Action

Having dismissed all federal claims alleged, the Court exercises its discretion under 28 U.S.C. § 1367(c) to dismiss the remaining state law causes of action for lack of subject matter jurisdiction.

V Conclusion

The Court GRANTS Defendant's Motion to Dismiss as to Plaintiffs' First, Third, Fifth, and Seventh claims. The Court *sua sponte* DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety.

IT IS SO ORDERED.

Appendix D

29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary. subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, §3(c)(1), Nov 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or

religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who

did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, §23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, §10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93–259, §11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93–259, §21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95–151, §14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction

operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93–259, §§15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95–151, §5, Nov 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93–259, §10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95–151, §§6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee

employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child

employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the

scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after

the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the

same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title,

except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but

materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily

engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday. and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may

be included for such purposes in any other fifty-two week period.

Appendix E

29 C.F.R. § 779.372 NONMANUFACTURING ESTABLISHMENTS WITH CERTAIN EXEMPT EMPLOYEES UNDER SECTION 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term "employed by" is contained in §§779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to

establishments selling automobiles, trucks, and farm implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such

nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.